Supreme Court, U. S.
FILED
MAY 13 1975

IN THE

Supreme Court of the United States

October Term, 1974

Docket No. 74-742

FOREMOST-McKESSON, INC.,

Petitioner,

v.

PROVIDENT SECURITIES COMPANY,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

ANSWERING BRIEF OF PETITIONER FOREMOST-McKESSON, INC. TO *AMICUS CURIAE* BRIEF OF ALLIS-CHALMERS MANUFACTURING COMPANY

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On behalf of Petitioner Foremost-McKesson, Inc. we wish to provide an explanation for the terse and unilluminating statement on page 1 of the Allis-Chalmers' motion for leave to file an *amicus* brief to the effect that although attorneys for Respondent consented to the motion, "attorneys for the Petitioner in whose behalf this brief is submitted" refused to consent.

Attorneys for the Petitioner take no exception whatsoever to the Allis-Chalmers brief as *amicus*; the principles of law there set forth are in accord with those set forth in Petitioner's Brief. Our consent was refused not because of anything in the Allis-Chalmers brief but because of the tendentious nature of the statement of facts of the *Provident* case in the accompanying motion. We are informed, however, that had the motion not contained the matters to which we take exception, attorneys for Respondent would not have consented thereto.

The price that Allis-Chalmers apparently paid to obtain such consent consisted of incorporating in the motion a distorted statement of background "facts" which has run through all of Respondent's previous memoranda, petitions and motions. The distortions are the purported basis for the unwarranted contention that Respondent's purchase of Foremost-McKesson's securities was something less than voluntary. For example, the Allis-Chalmers' motion characterizes Provident's purchase as having come about because "Foremost required as a condition to purchasing two-thirds of Provident's assets that Provident accept in part payment, Foremost convertible debentures" (pp. 2-3); and again, that the District Court's decision was uttered "against this background of Foremost's insistence upon the form which this transaction assumed" (p. 3). This portrayal of the Provident—Foremost-McKesson transaction, and the alleged contrast between it and the fact pattern of the Allis-Chalmers transaction which is described as having involved "voluntary purchases and sale of publicly traded securities" leads to the injection into the motion of concepts which never had any place in the law of

Section 16(b) (p. 5). As Allis-Chalmers would apparently have it, "a major conglomerate corporation" is somehow freer than a personal holding company to voluntarily further "its own plans and pursuits" (p. 4) and that such is of relevance in determining whether the doctrine of "equitable estoppel" should be invoked. On the other hand, Allis-Chalmers' brief, with which we are in accord, properly observes that the purpose of the statute was and is "to create an irrebuttable presumption of intent, to be inferred solely from the fact of a short-swing purchase and sale" (p. 15).

As a matter of law and fact, the purchase and sale of the Foremost securities by Provident was every bit as voluntary as was the purchase and sale of the Allis-Chalmers common stock by Gulf & Western Industries, Inc.

Dated: May 12, 1975

Respectfully submitted,

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